

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSIE J BELL, No C 07-3171 VRW  
Plaintiff, ORDER  
v  
MICHAEL J ASTRUE,  
Commissioner of Social Security,  
Defendant.

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Plaintiff Josie J Bell appeals from the decision of the Social Security Administration (SSA) denying plaintiff supplemental security income (SSI) and disability insurance benefits (DIB). The parties have filed cross-motions for summary judgment. The court DENIES plaintiff's motion and GRANTS the cross-motion by defendant Michael J Astrue.

I

A

Plaintiff was born on June 16, 1954. Administrative Record (Doc # 8) (AR) 66. Plaintiff is a high school graduate and has taken some college classes. AR 432. From 2001 until her alleged onset of disability in 2003, her occupation was "caregiver"

1 for In-Home Supportive Services. AR 89. One of plaintiff's jobs  
2 was to take care of an autistic woman by performing household  
3 duties, pushing her in a wheelchair and dressing her. AR 433. Her  
4 other work experience includes clerical and data entry jobs. AR  
5 84. The Administrative Law Judge (ALJ) described plaintiff's work  
6 history as reflecting "very low and sporadic earnings," which he  
7 attributed to her history of substance abuse. AR 25.

8 Plaintiff alleges that she became disabled on August 31,  
9 2003 after she injured her right middle finger. AR 66, 85, 433-34.  
10 In her application for benefits, plaintiff listed "severe  
11 depression-psychosis, herniated disc, thyroid disorder, [right]  
12 middle finger crushed." AR 88.

13 Plaintiff developed herniated discs in the lumbar spine  
14 in the 1980s while moving heavy furniture. AR 238. The herniated  
15 disc condition is well-documented in the record (see, e g, 269,  
16 365, 369, 413, 416) and was credited by the ALJ as a "severe"  
17 impairment. AR 23.

18 In late August 2003, plaintiff injured the middle finger  
19 on her right hand by slamming it in a car door, resulting in a  
20 "mallet finger" deformity after which plaintiff could not fully  
21 extend that finger. AR 200-01, 433. Although plaintiff  
22 characterized this event as the onset of her period of disability,  
23 there is little discussion of this condition in the record and the  
24 ALJ did not credit it among her "severe" impairments.

25 On August 6, 2004, plaintiff was taking the garbage downstairs  
26 when she slipped and fell down "eight flights of stairs,"  
27 sustaining a right rotator cuff tear in her shoulder. AR 438-40.  
28 The limitations attributable to this injury form the crux of

1 plaintiff's appeal. Plaintiff received treatment for the shoulder  
2 injury that included several medical examinations, a magnetic  
3 resonance imaging (MRI) scan and physical therapy. A September 10,  
4 2004 physical therapy orthopedic evaluation indicates that  
5 plaintiff had pain in reaching, lifting or using her right  
6 extremity. AR 297. She had tingling in her fingers and had  
7 difficulty "gripping." Id. Plaintiff, however, only went to two  
8 physical therapy sessions, both in September 2004. Although the  
9 treatment plan called for therapy sessions once or twice a week for  
10 several months, plaintiff cancelled one or two subsequent  
11 appointments and failed to show up for the others. AR 298-300. On  
12 December 1, 2004, plaintiff underwent a MRI scan which revealed a  
13 "[f]ull-thickness tear with atrophy and retraction of the  
14 supraspinatus tendon." Thereafter, plaintiff's medical chart notes  
15 periodically mention shoulder pain. AR 366, 369, 413, 416. For  
16 example, a progress note dated May 19, 2006 includes "Has some  
17 chronic R shoulder pain. Needs refill of meds." AR 413. The ALJ  
18 credited the rotator cuff injury as a "severe impairment." AR 23.

19           The record contains three reports evaluating plaintiff's  
20 physical residual functional capacity (RFC). The first two were  
21 completed before plaintiff incurred her rotator cuff injury.

22           On January 29, 2004, Dr Burton Brody, a consultative  
23 internist, examined plaintiff and prepared a consultative physical  
24 evaluation at the request of the SSA. AR 238-40. Dr Brody noted  
25 plaintiff's herniated discs, depression, hypothyroidism with goiter  
26 and tendinitis and opined that she had no sitting limitations and  
27 could walk and stand up to a total of four hours per day. AR 238,  
28 240. Dr Brody found plaintiff able to lift and carry up to ten

1 pounds with moderate limitations on motions such as bending,  
2 stooping, kneeling, crawling, and squatting. AR 240.

3 On February 19, 2004, Dr Joseph W Clift, a non-examining  
4 agency physician, prepared a physical RFC evaluation based on  
5 evidence in the file, including clinical and laboratory findings,  
6 symptoms and observations. AR 287-94. Unlike Dr Brody, Dr Clift  
7 found that plaintiff could sit no more than six hours in an eight-  
8 hour workday, but could stand and/or walk for a total of about six  
9 hours. AR 288. He found that she could occasionally lift and/or  
10 carry up to twenty pounds and frequently lift and/or carry ten  
11 pounds and could climb, balance, stoop, kneel, crouch and crawl  
12 only occasionally. AR 289.

13 On December 22, 2005, two months after plaintiff's  
14 October 2005 hearing before the ALJ (discussed below), treating  
15 physician Farrell C Barnett of the Alameda County Medical Center  
16 filled out a "multiple impairments questionnaire" prepared by  
17 plaintiff's attorney regarding plaintiff's physical conditions. AR  
18 357-64. The ALJ had held the record open in order to be able to  
19 consider a report from a treating physician addressing the rotator  
20 cuff injury and plaintiff's drug use status. AR 450-56. Beginning  
21 in December 2003, Dr Barnett had seen plaintiff once every three to  
22 six months. AR 357. Dr Barnett only recorded diagnoses of  
23 hypothyroidism and right shoulder tendinitis; he did not mention  
24 lumbar difficulties. Id. According to Dr Barnett's rather sparing  
25 and cryptic markings on the questionnaire, plaintiff could sit,  
26 stand or walk for only four hours in an eight-hour day but, while  
27 it was not medically necessary for her "not to sit continuously in  
28 a work setting," she required freedom to get up and move around as

1 needed. AR 359-60. Dr Barnett opined that plaintiff could  
2 occasionally lift and/or carry no more than ten pounds. AR 360.

3 In response to the question "Does your patient have  
4 significant limitations in doing repetitive reaching, handling,  
5 fingering or lifting?," Dr Barnett wrote: "Yes. [Illegible] R upper  
6 extremity." Id. Dr Barnett left blank a half-page of questions  
7 designed to refine or seek more detail about upper extremity  
8 limitations. AR 301. To the question "Would your patient's  
9 symptoms likely increase if he/she were placed in a competitive  
10 work environment?," Dr Barnett first checked "no," then crossed it  
11 out and checked "yes" and inserted the handwritten note: "if she  
12 used her R arm a lot." AR 361-62. In the section on pain, Dr  
13 Barnett noted only "pain in R shoulder," which he indicated  
14 occurred "daily—often during day," rated seven on a ten-point  
15 scale and was "periodically" severe enough to interfere with  
16 attention and concentration. AR 358-59, 362. Dr Barnett checked  
17 blanks indicating plaintiff was not in his opinion a malingerer and  
18 was capable of low-stress jobs. AR 362-63.

19 Plaintiff's long history of depression and substance  
20 abuse takes up much of the administrative record but is not at  
21 issue on this appeal. To summarize it briefly, plaintiff received  
22 treatment in her former community in Arkansas for depression in  
23 1998-99 and was prescribed antidepressant and antipsychotic  
24 medications. AR 167, 170. In September 2003, plaintiff  
25 voluntarily entered the Orchid Women's Recovery Center in Oakland.  
26 AR 84, 121. In November 2003, plaintiff visited Sausal Creek  
27 Outpatient Stabilization Clinic in Oakland, California for mental  
28 health outpatient care. AR 208. Plaintiff reported to the clinic

1 that she last used crack and alcohol just before entering the  
2 recovery program. Id. Plaintiff was given Wellbutrin, an anti-  
3 depressant medication to treat major depressive disorder. AR 215.

4 On January 23, 2005, plaintiff was brought to Eden  
5 Medical Center after a referral from the Sausal Creek Mental Health  
6 Clinic in Oakland for suicidal ideations. AR 315. Plaintiff  
7 reported that she was in a lot of pain due to her rotator cuff  
8 injury, fibroids in her uterus and two herniated discs and she  
9 admitted that she had been using crack cocaine daily since July  
10 2004. Id. She also admitted that she had drunk alcohol that night  
11 and wanted to jump from the Golden Gate Bridge. Id. The treating  
12 doctors prescribed Prozac and Wellbutrin for depressive disorder,  
13 Levoxyl for hypothyroidism, Seroquel for psychotic conditions and  
14 Vicodin for pain. AR 302. After plaintiff was stabilized, she was  
15 discharged on January 26, 2005.

16 The record contains two mental RFC assessments. Both  
17 concluded that plaintiff was able to carry out simple repetitive  
18 tasks but not detailed instructions. Clinical psychologist Dr  
19 Vicky Campagna's January 27, 2004 evaluation included the Bender  
20 Visual Motor Gestalt test, the Wechsler Adult Intelligence Scale  
21 III test and the Wechsler Memory Scale III test. AR 231. Dr  
22 Campagna opined that plaintiff's "ability to function in a work-  
23 related setting was not impaired" and she was able to learn simple  
24 repetitive tasks, follow simple two- and three-part instructions  
25 and sustain independent activities. AR 234. Dr Campagna diagnosed  
26 plaintiff with major depression and "polysubstance dependence in  
27 short-term remission" with a Global Assessment of Functioning (GAF)  
28 score of 60. AR 234-35.

1           On February 18, 2004, Dr George Norbeck, a non-examining  
2 DDS physician, prepared a psychiatric review technique form, AR  
3 242-55. Dr Norbeck checked boxes for the affective disorder  
4 "depressive syndrome" with anhedonia, appetite disturbance, sleep  
5 disturbance, decreased energy, feelings of guilt and difficulty  
6 concentrating or thinking. AR 245. He also found a substance  
7 addiction disorder to be present indicating that he had evaluated  
8 it under affective disorders. AR 250. In the section of the form  
9 dealing with rating functional limitations, Dr Norbeck indicated no  
10 restriction of activities of daily living, mild limitation in  
11 maintaining social functioning and mild to moderate limitation in  
12 maintaining concentration, persistence or pace. AR 252. On the  
13 same date, Dr Norbeck completed a mental RFC assessment in which he  
14 found no significant limitations in any of twenty areas of  
15 functioning except the ability to understand and remember detailed  
16 instructions and to carry out such instructions, which he noted to  
17 be "markedly limited." AR 283. He also marked both "not" and  
18 "moderately limited" for the ability to maintain attention and  
19 concentration for extended periods. Id.

## B

22           On October 23, 2003, plaintiff applied for SSI and DIB  
23 under Title II and Title XVI of the Social Security Act  
24 respectively. AR 66-68, 405-06. The SSA denied plaintiff's  
25 initial application on April 2, 2004, AR 37-41, and her  
26 reconsideration request on November 29, 2004. AR 46-51. Plaintiff  
27 then requested a hearing before an ALJ, which was held on October  
28 24, 2005. AR 428-58.

1 Plaintiff appeared at the hearing with her lawyer and  
2 testified about her physical limitations, depression and substance  
3 abuse. AR 428-58. No expert witnesses testified at the hearing.  
4 AR 430. Compared to the three reports evaluating plaintiff's  
5 physical limitations, plaintiff assessed her own RFC as more  
6 limited. Plaintiff stated that: her herniated discs caused her  
7 left leg to tremble and shake after standing for more than ten  
8 minutes or walking for more than five minutes (AR 443, 445-46); she  
9 could sit for only fifteen minutes before needing to get up and  
10 move around (AR 446); her left hand could not lift more than five  
11 to six pounds, due to limited strength on the left side of her body  
12 (AR 446-47) and the right rotator cuff tear rendered her unable to  
13 raise her right arm above her shoulder, lift anything, make a bed,  
14 curl her hair or even hold a pencil. AR 436-37. When asked what  
15 medical problems prevented her from returning to work, plaintiff  
16 testified that in 1996, she went through a divorce, her mother died  
17 and her adult son was shot. When pressed for current information,  
18 she testified that she still suffered from depression and anxiety  
19 and "a general sense of sadness all the time." AR 440-41.  
20 Plaintiff also testified that she had a history of substance abuse,  
21 including pain pills, methamphetamine and cocaine (AR 441, 444) but  
22 had stopped using drugs the day before her admission to Eden  
23 Medical Center in January of 2005. AR 444.

24 On March 31, 2006, the ALJ issued a ten-page decision  
25 denying plaintiff's applications. The ALJ found that: 1)  
26 plaintiff met the insured status requirements of the Act through  
27 June 2006 and had not been engaged in substantial gainful activity  
28 during the relevant period; 2) of plaintiff's impairments, the

1 cocaine dependence, major depressive disorder, degenerative disease  
2 of the lumbar spine and right shoulder rotator cuff tear were  
3 "severe"; 3) plaintiff's impairments did not meet or equal either  
4 of two listed impairments in Part 404, specifically Listing 12.04  
5 together with 12.09 (affective disorder with substance addiction  
6 disorder) or 1.01 (musculoskeletal impairments); 4) plaintiff  
7 retained the physical RFC for sedentary work with a limitation for  
8 overhead work with the right arm but, due to drug addiction and  
9 depression, was precluded from sustained work activity; 6) due to  
10 cocaine addiction, plaintiff could not perform her past relevant  
11 work as a clerk or any other job that existed in significant  
12 numbers in the national economy. AR 23-27. The ALJ concluded that  
13 if plaintiff were to stop the substance use, she could perform  
14 sedentary jobs without right-arm overhead work involving simple,  
15 repetitive tasks that exist in significant numbers in the national  
16 economy. AR 28. Finally, the ALJ determined that because the  
17 substance use was a contributing factor material to the  
18 determination of disability, plaintiff had not been disabled within  
19 the meaning of the Social Security Act at any time through the date  
20 of the decision. AR 29.

21           The ALJ discounted Dr Barnett's opinion that plaintiff  
22 could sit only four hours in an eight-hour work day, a limitation  
23 that would have barred plaintiff from most sedentary work under  
24 Social Security Ruling 96-9p. The ALJ reasoned that no weight  
25 should be assigned to Dr Barnett's sitting limitation because that  
26 functional assessment was based on plaintiff's right shoulder  
27 tendinitis only and contained "no mention of any ongoing low back  
28 pain, or limitations from lumbar degenerative disc disease." AR

1 25-26. Instead, the ALJ relied on Dr Brody's consultative physical  
2 evaluation in concluding that plaintiff was limited to sedentary  
3 work as opposed to light work in accordance with non-examining  
4 physician Dr Clift's opinion. The ALJ stated:

5 I credit the examination of consultative internist that  
6 the claimant is limited to sedentary work. The DDS  
7 assessed that the claimant could perform light exertion  
work, even considering her lumbar degenerative disc  
disease and moderate obesity.

8 AR 26. The ALJ credited Dr Brody's opinion over Dr Clift's because  
9 the latter did not examine plaintiff and credited plaintiff's  
10 complaints of lower back pain "to reduce the DDS finding of light  
11 exertion work to sedentary work." AR 26, 28.

12 On May 11, 2006, plaintiff requested the SSA's Appeals  
13 Council to review the ALJ decision. AR 14-16. The Appeals Council  
14 denied review, and the ALJ's decision became final. AR 8-11. On  
15 June 15, 2007, plaintiff commenced the instant action for judicial  
16 review of the final decision. After defendant answered, both  
17 parties filed cross-motions for summary judgment. Doc # 10, 11.

18  
19 II

20 A district court's review of an ALJ's decision is limited  
21 to determining whether it is supported by substantial evidence and  
22 correct legal principles. See generally, Thomas v Barnhart, 278  
23 F3d 947, 954 (9th Cir 2002). "Substantial evidence" is "more than  
24 a mere scintilla but less than a preponderance; it is such relevant  
25 evidence as a reasonable mind might accept as adequate to support a  
26 conclusion." *Id.* Determinations of credibility, resolution of  
27 conflicts in medical testimony and all other ambiguities are to be  
28 resolved by the ALJ. *Id.*

1 To determine whether a claimant is disabled and entitled  
2 to benefits, the SSA conducts a five-step sequential inquiry. 20  
3 CFR § 404.1520. Under the first step, the ALJ considers whether  
4 the claimant is currently employed in substantial gainful activity.  
5 If not, in the second step the ALJ examines whether the claimant  
6 has a "severe impairment" that significantly affects his or her  
7 ability to conduct basic work activities. In step three, the ALJ  
8 determines whether the claimant has a condition which "meets" or  
9 "equals" the conditions outlined in the Listings of Impairments in  
10 Appendix 1, Subpart P, Regulations No 4. 20 CFR §404.1520. If the  
11 claimant does not have such a condition, in step four the ALJ  
12 considers whether the claimant can perform her past relevant work.  
13 If not, in step five, the ALJ considers whether the claimant has  
14 the ability to perform other work which exists in substantial  
15 numbers in the national economy. 20 CFR §§404.1520(b)-(f).

16 Even if a claimant is found "disabled" under the five-  
17 step evaluation process in 20 CFR § 404.1520, the ALJ must find the  
18 claimant "not disabled" if the medical evidence indicates that drug  
19 addiction and/or alcoholism materially contributed to the finding.  
20 Parra v Astrue, 481 F3d 742, 747 (9th Cir 2007). The ALJ must  
21 determine which of the claimant's disabling limitations would  
22 remain if claimant stopped abusing drugs and alcohol. 20 CFR §  
23 404.1535(b). If the remaining limitations would not yield a  
24 disability finding, then the claimant's substance abuse is material  
25 and benefits must be denied. Id.

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## III

Plaintiff contends that the ALJ erred in finding her not disabled. She does not challenge the ALJ's drug and alcohol analysis with regard to her mental limitations—i e, that if she discontinued her drug use, only her physical limitations would remain. Plaintiff contends, however, that the ALJ erred in ruling that plaintiff possessed the physical RFC for sedentary work excluding overhead work with the right arm because, she contends, the right shoulder tendinitis is responsible for a more grave limitation to her RFC than the ALJ's determination acknowledges.

Specifically, plaintiff contends that the ALJ improperly ignored Dr Barnett's opinion that plaintiff had significant limitations in performing repetitive reaching, handling, fingering or lifting with her right arm. Doc #10 at 12-13. Social Security Ruling 85-15 states that "reaching \* \* \* and handling \* \* \* are activities required in almost all jobs. Significant limitations of reaching or handling, therefore, may eliminate a large number of occupations [that] a person could otherwise do. Varying degrees of limitations would have different effects, and the assistance of a [vocational expert] may be needed to determine the effects of the limitations." Similarly, fingering "is needed to perform most unskilled sedentary jobs and to perform certain skilled and semiskilled jobs at all levels of exertion." Id. "The varying degrees of loss which can occur may require a decision-maker to have the assistance of a [vocational expert]." Id.

Plaintiff argues that the rules about treating source medical opinions articulated in Lester v Chater, 81 F3d 821, 830 (9th Cir 1995), govern this case. Specifically, where the treating

1 doctor's opinion is not contradicted by another doctor, it may be  
2 rejected only for "clear and convincing" reasons. Id. In this  
3 case, the record contains no other physician's opinion about the  
4 rotator cuff because the injury occurred ten months after she had  
5 applied for benefits and after the consulting physical RFC and non-  
6 examining medical reviews had been completed. The ALJ had already  
7 delayed rendering a decision in the case in order to allow  
8 plaintiff to obtain the RFC assessment from Dr Barnett and to  
9 supplement the administrative record with it. There is, therefore,  
10 no medical evidence in the record contradicting Dr Barnett's  
11 opinion that plaintiff had significant limitations in performing  
12 repetitive reaching, handling, fingering or lifting. Plaintiff  
13 argues that Dr Barnett's opinion may be rejected only for "clear  
14 and convincing" reasons. She asks, moreover, that her case be  
15 remanded to the SSA for an award of benefits solely on the strength  
16 of Dr Barnett's scant notations on the RFC questionnaire.

17           There are several problems with plaintiff's argument.  
18 First, Dr Barnett's report is patently insufficient to support a  
19 disability finding. Dr Barnett left blank all the questions  
20 bearing directly on specific right upper extremity limitations:  
21 those evaluating the degree of limitation, if any, in "grasping,  
22 turning and twisting objects," "using fingers/hands for fine  
23 manipulations" and "using arms for reaching (including overhead)."  
24 AR 361. Also, Dr Barnett wrote that plaintiff's prognosis was  
25 "good" and marked "N/A" for other treatment, such as surgery and  
26 physical therapy. AR 357, 361. A reasonable reading of Dr  
27 Barnett's report is that he did not regard the right rotator cuff  
28 injury as disabling, either in the short or the long term.

1 Second, the ALJ did not discount or reject Dr Barnett's  
2 opinion, but rather credited it and used it as the basis for his  
3 step-four determination that plaintiff could not return to clerical  
4 work because of the potential for overhead tasks. AR 25.  
5 According to the Merck Manual, the rotator cuff's primary function  
6 is to provide stability during overhead arm motions:

7 The rotator cuff, consisting of the supraspinatus,  
8 infraspinatus, teres minor, and subscapularis (SITS)  
9 muscles, helps stabilize the humerus in the glenoid  
10 fossa of the scapula during many athletic overhead  
arm motions (eg, pitching, swimming, weightlifting,  
serving in racket sports).

11 [http://www.merck.com/mmpe/sec21/ch324/ch324e.html?qt=rotator%20cuff](http://www.merck.com/mmpe/sec21/ch324/ch324e.html?qt=rotator%20cuff&alt=sh#sec21-ch324-ch324e-978)  
12 &alt=sh#sec21-ch324-ch324e-978 (consulted July 23, 2008). Imposing  
13 a limitation on overhead work with the affected arm was therefore a  
14 reasonable way for the ALJ to interpret the evidence in the record.

15 And finally, plaintiff failed to avail herself of  
16 physical therapy that might have helped her rotator cuff condition,  
17 a fact of considerable legal significance. 20 CFR § 404.1530  
18 requires a claimant to follow treatment prescribed by treating  
19 physicians, clearly stating that the consequence of failing to  
20 follow treatment is denial or loss of benefits:

21 If you do not follow the prescribed treatment without  
22 a good reason, we will not find you disabled or, if  
you are already receiving benefits, we will stop  
paying you benefits.

23 20 CFR § 404.1530(b). When plaintiff first presented with her  
24 rotator cuff injury, her physician prescribed a course of physical  
25 therapy. Plaintiff did not follow the course of therapy but  
26 abandoned it after two sessions. AR 297-300. At the hearing, the  
27 ALJ asked plaintiff whether she was receiving physical therapy. AR  
28 452. Plaintiff responded misleadingly: "I don't have any medical

1 insurance" (AR 453) and did not tell the ALJ that she had already  
2 had a course of physical therapy scheduled and had failed to avail  
3 herself of most of it. Although the ALJ may not have been aware of  
4 this and, indeed, did not mention it in his decision, the evidence  
5 in the record documenting plaintiff's failure to follow through  
6 with prescribed therapy further buttresses the ALJ's decision.  
7 Plaintiff may not receive disability benefits without first  
8 exhausting medically prescribed treatment options available to  
9 address the alleged discomfort, weakness and decreased range of  
10 motion in her right arm and hand.

11  
12 IV

13 For the foregoing reason, the court DENIES plaintiff's  
14 motion for summary judgment and GRANTS defendant's motion for  
15 summary judgment. The clerk is directed to close the file and  
16 terminate all pending motions.

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18 IT IS SO ORDERED.

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21 VAUGHN R WALKER  
22 United States District Chief Judge  
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